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No. __-____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1993

MIKE ENTEZARI,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

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QUESTIONS PRESENTED

1. Does it violate the Particularity Clause of the Fourth Amendment for police executing a warrant which authorizes the search of specifically described house, but which makes no mention of any car, nor any mention of the curtilage, to rely upon the warrant as vesting them with implied authority to search any car found parked on the premises outside the home?

2. Does it violate the Probable Cause Clause of the Fourth Amendment for police to search a locked vehicle parked outside a house pursuant to a valid search warrant authorizing search of the house, when there has been no showing that there exists probable cause to believe that the car contains evidence of a crime?

3. When police rely upon a search warrant as their authority for searching a locked car, does the police affiant's failure to mention the fact that police have already searched the same car previously on that same day, and that no evidence was found, constitute a deliberate omission of a material fact in violation of the Fourth Amendment doctrine of *Franks v. Delaware*, 438 U.S. 154 (1978)?

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MIKE ENTEZARI,

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ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

Petitioner, Mike Entezari, respectfully prays that a writ of certiorari issue to review the decision of a panel of Division Two of the Washington Court of Appeals, affirming the judgment of conviction for the crime of murder in the first degree, entered in the Clark County Superior Court.

OPINION BELOW

Petitioner Mike Entezari was tried and convicted of murder in the first degree in Clark County Superior Court. He appealed to the Washington Court of Appeals, Division Two. That court affirmed his conviction in an unpublished opinion issued on January 25, 1993. (Appendix A).

Entezari sought discretionary review by the Washington Supreme Court. The state supreme court denied his petition for review by an order entered on June 10, 1993. (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner's wife Effie Entezari was shot and killed on May 1, 1989 in Vancouver, Washington.[1] There were no witnesses. Police, suspecting that her husband might have been the killer, contacted Mike Entezari in the parking lot of the Providence Hospital in Portland, Oregon shortly after 4 p.m. RP VII, 1007.[2] Detectives told him that his wife has been killed and asked for permission to search his red Honda. RP 1A, 56, 40. Entezari consented; Detective Trimble searched the car checking all areas which he "felt would be big enough to hide a weapon," including inside the glove compartment, the passenger compartment and inside the trunk, but found nothing. RP 1A, 37–42.

Entezari was not arrested at that time, but was kept under police surveillance. Later that day, at 10 p.m., Entezari was stopped by police and his hands were swabbed in an ultimately unsuccessful effort to pick up chemical traces of gunshot residue. RP VII, 1008; RP IV, 542. He was informed that police were in the process of

[1] (Vancouver, Washington is the city located immediately north of Portland, Oregon on the Washington side of the Columbia River.)

[2] "RP" refers to the transcript or, as it is known in Washington State, to the "report of proceedings."

getting a search warrant for his residence. He was told that if he went home he would be accompanied to make sure that he didn't destroy any evidence before the search warrant could be obtained and executed. Mr. Entezari chose to go home, and he was accompanied there by police. RP VII, 1108.

At 12:40 a.m. on May 2, 1989 a search warrant was issued by a Washington State District Court Judge which authorized a search of Mr. Entezari's house at 8720 N.E. Benton Drive in Vancouver, Washington. The search warrant stated in pertinent part:

> THE PEOPLE OF THE STATE OF WASHINGTON, to any Sheriff, Policeman, or Peace Officer in the County of Clark: Proof by oral telephonic statement under oath, made in conformity with the State of Washington Criminal Rules for Justice Court, Rule 2.3, Section (C), having been made this day by Clark County Deputy Sheriff STEVE R. NELSON, that there is probable cause for the issuance of a Search Warrant on the grounds set forth in the State of Washington Criminal Rules for Justice Court, Rule 2.3, Section (C).
>
> YOU ARE THEREFORE COMMANDED, that with the necessary and proper assistance to make a diligent search, good cause having been shown therefore, of the following described property, within seventy-two hours of this warrant:
>
> **A DARK BLUE AND LIGHT SINGLE STORY RANCH STYLE, WOOD FRAME HOME WHICH HAS A COMPOSITION STYLE ROOF, BEARING THE SPECIFIC ADDRESS OF 8720 N.E. BENTON DRIVE, VANCOUVER, CLARK COUNTY, STATE OF WASHINGTON.**
>
> for the following described property: A .38 CALIBER HANDGUN, .38 CALIBER BULLETS, ONE RECEIPT SHOWING THE PURCHASE FOR SAID HANDGUN AND BULLETS, ONE GREY JACKET, ONE PAIR OF FADED BLUE JEANS, ONE BLUE SHIRT AND WHITE TENNIS SHOES, SAID CLOTHING ITEMS BEING FOUND ON THE DEFENDANT
>
> . . . and bring the same before the Honorable District Court Judge to be disposed of according to law.

Mr. Entezari and two attorneys who were advising him were present when the police executed the search warrant and searched the house. RP 1A, 10, 29. At the time of the search of the house, Mr. Entezari's red Honda was parked in the driveway of the residence, just outside the closed door of the garage. RP 1A, 21.

When police failed to find a gun in the house, a detective announced he wanted the keys to the Honda so that he could search it. RP 1A, 29. Attorney Karin Dedona objected, stating that the search warrant which had been issued did not authorize a search of any car. RP 1A, 29. The detective replied "that he wished to have the keys, that he was going to search it [the car] no matter what" and "that he would have to break in if in fact he [Entezari] didn't give him the keys." RP 12A, 30. Although attorney Dedona suggested that the Detective telephone the judge who had issued the search warrant, and request that the scope of the warrant be extended to include Mr. Entezari's car, the police refused to do so.

The car keys were turned over under protest. Police unlocked the car, searched it, and found a .38 revolver under a floor mat in the back seat. RP 1A, 30–31, 112. The prosecution later stipulated that the car was searched without Mr. Entezari's consent, and that there was no probable cause to believe that the car contained any evidence of any crime, because it had already been searched earlier that day.

Mr. Entezari made five separate pretrial motions to suppress the gun as the fruit of an unlawful search. All five motions were denied. Clerks Papers 295. The judge who heard and denied the motions to suppress entered the following specific findings of fact, which were not challenged on appeal:

> The search warrant issued by Judge Zimmerman did not describe or refer to the 1980 Honda vehicle in any specific way. No reference was made in the affidavit that the items of evidence were to be found within the vehicle. The search warrant itself did not refer to the 1980 Honda or any automobile that might be present on the Entezari property.

Finding of Fact No. 4 (Supplemental Clerks Papers 16).

At trial the jury heard conflicting expert testimony as to whether or not the gun found in Mr. Entezari's red Honda could possibly be the same gun that had been used to shoot Mrs. Entezari. RP V, 664, 691-93; RP VII, 985, 989; RP VI, 912–13; RP VII, 1034-35, 1047. Mr. Entezari consistently maintained his innocence. RP VIII, 1110.

The jury found Mr. Entezari guilty; the trial judge sentenced him to 25 years in prison. Clerks Papers, 475, 480. Entezari filed a timely appeal to Division Two of the Washington Court of Appeals.

On January 25, 1993 the Washington Court of Appeals issued a decision affirming Entezari's conviction, and rejecting his contentions that the search of his red Honda had violated the Fourth Amendment to the United States Constitution. (Appendix A).

Mr. Entezari argued unsuccessfully that the search of the Honda violated the Particularity Clause of the Fourth Amendment, because the search warrant did not state that the officers could search any car. The Court of Appeals rejected this argument, reasoning that the search warrant did mention a specific house; the mention of this house necessarily included the curtilage surrounding the house; the car was parked on the curtilage in the residential driveway outside the house; and therefore the warrant did authorize the police to search the car even though it made no specific mention of the search of any car.

The Court of Appeals' opinion states in pertinent part:

> Here, the warrant did not authorize a search of "premises." Rather it authorized a search of a specific "home," described as "a dark blue and light blue single story ranch style, wood frame home . . ." We must determine, therefore, if the warrant authorizing a search of that home authorized a search of property within the curtilage, and if so, whether the Honda was within the curtilage.

(Appendix A, page 5).

The Washington Court of Appeals went on to conclude that the search warrant language authorizing search of the "home" was to be

construed as also authorizing a search of the surrounding curtilage, and that since the Honda was parked in the driveway which was part of the curtilage, that the warrant particularly authorized a search of the inside of the Honda as well as a search inside the home.

> We conclude that "curtilage," the area intimately tied to the home, is part of the home and, as such, falls within the ambit of a search warrant authorizing the search of a home. The fact that the home is specifically described by color, style and size, does not detract from that conclusion. Indeed a specific description of the place to be searched is necessary to justify the constitutional requirement of particularity and serves primarily to minimize the risk that police will mistakenly search a place other than the place intended. Here, the specific description of the place to be searched, including a street address and physical description of the house, adequately apprised the police of the place to be searched.
>
> Whether a specific area is within the curtilage is "determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family." [Citation omitted]. Even though a defendant has a reasonable expectation of privacy in areas within the curtilage, he or she may have expressly or impliedly consented to intrusions into those areas. Thus, our Supreme Court has stated, "[i]t is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house." [Citations omitted]. Similarly, our Supreme Court has determined that a driveway may include areas that are impliedly open as well as areas that are expected to be private. [Citation omitted].
>
> Here the trial court's unchallenged findings establish that the Honda was parked in the driveway adjacent to Entezari's house, "approximately two feet from a garage" which was part of the same structure. It is clear from these findings that the driveway where the Honda was parked, was in close proximity to the dwelling and was associated with the home. It is logical, therefore, to assume that it was part of the curtilage. The trial court correctly concluded that the search of the Honda was

> within the scope of the warrant authorizing a search of the home.

(Appendix A, pages 6-7).

Mr. Entezari also unsuccessfully argued that there was a fatal lack of probable cause to believe that there would be any evidence of any crime inside the car, and therefore that the gun found in the car should have been suppressed. The Court of Appeals rejected this contention, and specifically approved of the trial court's legal conclusion that since the car was "nothing more than a container," it was not necessary to make any showing that there was probable cause to believe that the car contained evidence. According to the Washington Court of Appeals it was sufficient that there was a showing of probable cause to believe that there might be evidence inside the home, which by implication included the curtilage outside the home, which by implication included the car parked on the curtilage. *See* Appendix A, at pages 7-9.

Mr. Entezari further argued unsuccessfully that the fruits of the search should have been suppressed because the affiant intentionally or recklessly omitted material facts from his affidavit which, had they been included, would have demonstrated an absence of probable cause to believe that the car contained evidence. In particular Entezari maintained that Detective Nelson's failure to mention the fact that the car had already been searched that same day, and that nothing had been found, was an omission of a material fact. The Court of Appeals disagreed. Although the Court did not specifically address the affiant's failure to mention that the car had already been searched, it did hold that even had all the omitted facts been included in the affidavit, there would still be "probable cause for the warrant." (Appendix A, at p. 12). Since the Court of Appeals had already held that there need not be any independent showing of probable cause to believe that the car contained evidence, it was, in the appellate court's view, irrelevant that the affiant failed to mention the fact that the car had already been searched for guns and nothing found.

Mr. Entezari sought discretionary review of the Court of Appeals' decision in the Washington Supreme Court. The Washington Supreme Court denied Entezari's petition for review on June 10, 1993. (Appendix B).

REASONS FOR GRANTING THE WRIT

A. THERE IS A SPLIT OF AUTHORITY AMONG STATE APPELLATE COURTS AS TO WHETHER A WARRANT AUTHORIZING SEARCH OF A SPECIFIC HOUSE ALSO NECESSARILY AUTHORIZES THE SEARCH OF ANY CAR PARKED ON THE PREMISES OUTSIDE THAT HOUSE.

The decision below is flatly in conflict with the appellate decisions of the courts of Maryland and New York. Courts in those states have concluded that a warrant authorizing a search of a specific house does *not* by implication authorize a search of a car parked on the premises outside such a house.

For example, in *Haley v. State,* 7 Md. App. 18, 253 A.2d 424, 428 (1969) the search warrant commanded the police:

> To enter and search the premises known as 2218 Westridge Rd., Timonium, Baltimore County, Maryland aforementioned and described, to search for, seize and remove any and all parts thereof of any narcotics, drugs, narcotic paraphernalia, implements or instruments used in connection with the use of drugs or narcotics, further to search the body or bodies of any person or persons found therein . . . and in particular that you search the body of Carl Welland described as a W.M between 19 and 20 years of age, long brown hair, reddish brown beard and mustache . . .

The police executing the warrant found several persons present at the house, arrested them all, and searched the automobile parked in the residence driveway which belonged to arrestee Peterson. The Maryland Court of Appeals held that since Peterson's arrest was

invalid, the search of his car could not be justified as a search incident to arrest. Therefore the issue for the Court to decide was whether the search warrant could be read as authorizing the search of Peterson's car. It held it could not.

> *The question is whether the search of the automobile was authorized by the warrant. There was no express command in the warrant to search the automobile although there may be a valid warrant for the search of a described automobile,* [Citations omitted]. The record before us does not show the exact location of the automobile when it was searched, except that it was parked on the driveway of the home. "There is quite a long driveway on the premises." Upon timely objection to the introduction of the pipe [found in Peterson's car] the [trial] court ruled that it was "within the bounds of the search and seizure warrant." It appears that the pipe was not within view in the automobile but in the glove compartment . . . In the circumstances here *we do not feel that the command in the warrant to enter and search the particularly described premises, authorized a search of Peterson's automobile even if it was parked on the property on which the premises were located.*

Haley, 253 A.2d at 431–32 (emphasis added).

Similarly, in *People v. Dumper,* 28 N.Y.2d 296, 270 N.E.2d 311 (1971), the New York Court of Appeals held that a warrant authorizing the search of a "one story wood frame cottage with white sidewall, green roof," and "a cottage east of the main house" did not authorize the search of a car parked on the premises:

> *Since a warrant must describe the premises to be searched, and this warrant did not include the automobile,* which was not on the premises when the police came with the warrant but which was driven into the driveway while police were there, *it did not justify search of the car.* [Citation omitted].
>
> Both the Federal and State Constitution require that a search warrant "particularly describ[e] the place to be searched" (U.S. Const., 4th Amdt.; N.Y.Const., art I, Section 12). The scope of search has been carefully limited. A warrant to search a

> building has been held insufficient to justify search of a shed attached to the building accessible through the apartment of another person. "Probable cause must be shown in each instance." [Citation omitted].

Dumper, 270 N.E.2d at 312. (emphasis added).

The New York Court of Appeals has adhered to *Dumper* and in the subsequent case of *People v. Sciacca,* 45 N.Y.2d 122, 379 N.E.2d 1153 (1978), the Court reaffirmed the holding of *Dumper* and expressly held that the particularity requirement cannot be eviscerated by extending the scope of search warrant authority by implication:

> *It is clear that a warrant to search a building does not include authority to search vehicles at the premises.* [Citation omitted]. The converse is also true. Authority to search a vehicle does not include authority to enter private premises to effect a search of a vehicle within those premises . . . *[T]he constitutional mandate of particularity of the place to be searched may not be circumvented by implication as the People urge.*

Sciacca, 379 N.E.2d at 1155 (emphasis added).[3]

On the other hand, the decision below is consistent with decisions of other state appellate courts, which have held that a warrant which authorizes the search of a specifically described residence and its curtilage,[4] also necessarily authorizes the search of

[3] In *Sciacca* law enforcement officials *did* obtain a warrant authorizing the search of the defendant's green van. They then staked out the defendant's garage, and watched as an unknown man drove up and parked outside the garage. The defendant arrived in another car and then drove the van inside the garage, closed the garage door, and left. Law enforcement then removed a loose panel from the garage door and crawled inside the garage and proceeded to search the van. The New York Court of Appeals rejected the contention that the warrant to search the van carried with it implied authority to enter the garage in which it had been parked, and therefore held that the fruits of the search of the van had to be suppressed.

[4] It should be noted that the search warrant issued in this case did *not* make any mention of either the "curtilage" or the "premises." If the existence of valid authority to search a car parked in a driveway on the premises turns upon whether the warrant uses these terms in addition to describing the building to be searched, the search of the car in this case was unlawful.

any car parked on the premises outside the residence. For example, the Florida Court of Appeals has held:

> We now hold that yards, courtyards, driveways and parking areas usually and customarily used in common by occupants of apartment complexes, condominiums and other such complexes with other occupants thereof, constitute a part of the curtilage of a specifically described apartment or condominium or other living unit thereof, and that an automobile located on such common areas and identified by the use of keys obtained from the occupant of such specifically described apartment, condominium or other living unit, is a part of that curtilage and subject to search upon the issuance of a valid warrant authorizing a search of the living unit and curtilage thereof.

Joyner v. State, 303 So.2d 60, 64 (Fla. App. 1974).

Appellate courts in Georgia, Oklahoma, Kentucky, Minnesota, North Carolina Ohio and Texas have reached similar conclusions. *Bellamy v. State,* 134 Ga.App. 340, 214 S.E.2d 383 (1975); *Massey v. Commonwealth,* 305 S.W.2d 755 (Ky. 1957); *State v. Lewis,* 270 N.W.2d 891 (Minn. 1978); *State v. Reid,* 286 N.C. 323, 210 S.E.2d 422 (1974); *State v. Tewell,* 9 Ohio App.3d 330, 460 N.E.2d 285 (1983)(warrant said "and surrounding curtilage" and car was in driveway within curtilage); *Leslie v. State,* 294 P.2d 854 (Okla. Crim. 1956); *Long v. State,* 532 S.W.2d 591 (Tex.Crim. 1975).

Professor LaFave has criticized the decisions which permit search of an automobile based upon a warrant authorizing a search of a specific residence and its surrounding premises:

> [I]t must be remembered that the Fourth Amendment requirement of particularity varies to some degree by what is reasonably practicable. A requirement that warrants for premises describe not only the premises generally but every conceivable hiding place therein would impose an intolerable burden; by comparison, it would seem relatively easy to include a description of the occupant's vehicle in the warrant if the warrant were intended to extend to the car.

W. LaFave, *Search and Seizure* 323 (1987).

This Court should grant certiorari to resolve this conflict between the states, and to decide the validity of Professor LaFave's criticism of state court decisions permitting searches of vehicles which happen to be on the premises outside a building which has been specifically described in a search warrant.

B. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRIOR DECISION IN *YBARRA v. ILLINOIS* REGARDING THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT.

This Court has previously held that a search warrant authorizing the search of a specifically described place does not carry with it the authority to search persons who happen to be present at that place when the warrant is executed. *Ybarra v. Illinois,* 444 U.S. 85, 92, n. 4, 62 L.Ed.2d 238, 100 S.Ct. 338 (1979).[5] Cars, like people, are mobile. They may or may not be present on the premises when a search warrant for those premises is executed. *Ybarra* holds that the Fourth Amendment forbids the search of a person who simply happens to be on the premises when a search warrant for that place is executed. Similarly, the Fourth Amendment principle of *Ybarra* should also forbid the search of a car which just happens to be parked on the premises outside the building described in the warrant.

This case vividly illustrates the arbitrariness of a rule permitting cars on the premises to be searched incident to a warrant authorizing search of a specific house. Had Mr. Entezari chosen not to accompany the police to his house, his car could not have been searched.[6] And if he had chosen to accompany them to his house,

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[5] "The Fourth Amendment directs that 'no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized.' Thus, 'open-ended' or 'general' warrants are constitutionally prohibited. [Citations omitted]. It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place."

[6] His car could not have been searched pursuant to the "automobile exception" to the warrant requirement. Since the police had already searched his car for evidence, just hours before, and had found nothing, they had no basis for probable cause to believe that the car contained any evidence.

but had parked on the public street immediately adjacent to his house, rather than in his own driveway, his car could not have been searched.

C. THE DECISION BELOW IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT REGARDING THE APPLICABILITY OF THE PROBABLE CAUSE REQUIREMENT OF THE FOURTH AMENDMENT TO WARRANTLESS CAR SEARCHES.

The Washington Court of Appeals concluded that since there was probable cause to search petitioner's house, and since his car was parked in the residential driveway on the premises of his house, there did not have to be any independent showing of probable cause to believe that the car contained evidence in order to justify search of the car. This conclusion is contrary to several prior decisions of this Court.

To begin with, this Court has consistently held that a warrant to search can never include more than that which is covered by the showing of probable cause. *Dumbra v. United States,* 268 U.S. 435, 441, 69 L.Ed. 1032, 45 S.Ct. 546 (1925). With respect to automobiles, this Court has held that they may be searched without a warrant *if* there is probable cause to believe that they contain contraband or evidence of a crime. *Carroll v. United States,* 267 U.S. 132, 153–154 (1925). This rule has been justified by the mobility of cars, and the impracticality of obtaining a search warrant fast enough to execute it before the car has been moved.[7]

But this Court has never held that the mobility of cars justifies dispensing with the Probable Cause requirement of the Fourth

[7] "[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed . . . as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

Amendment. On the contrary, this Court has stressed the fact that the existence of probable cause is the *sine qua non* of a valid automobile search.

> Those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorizes to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise . . .
>
> *The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause* for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.

Carroll, 267 U.S. at 155 (emphasis added).

After *Carroll* this Court held that so long as probable cause exists to believe that a car contains evidence of a crime or contraband, it may be searched without a warrant, either on the roadside at the point where police first seize it, or at the stationhouse after the car is taken there. "The probable cause factor still obtained at the stationhouse . . ." *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970). But this Court has never said that an automobile may be searched without there being any probable cause to believe that it contains either evidence or contraband.

The Washington Court of Appeals held in this case that since there was probable cause to believe that Mr. Entezari's *house* contained evidence of the crime of murder, there was no need to make an independent showing of probable cause regarding Mr. Entezari's car which he happened to park in the driveway to his residence. Once parked on the premises of the house, the car became, according to the Washington Court of Appeals, simply a container, like any other container that police might find on the premises of his house. The Washington Court of Appeals concluded that since the "container" — the car — was "within the scope of the warrant" by virtue of its being parked on the premises in the

driveway, that no independent showing of probable cause was necessary.[8]

Courts in some states have taken a similar position, reasoning that if there is a valid search warrant for a building, that the warrant authorizes the search of any vehicle on the premises outside the building whether or not there has been any showing of probable cause to believe that the car contains evidence or contraband. Petitioner submits that Professor LaFave's criticism of this position is well founded, and should be approved by this Court:

> It has often been held that a search warrant authorizing the search of certain premises covers automobiles found on those premises. The assumption seems to be that a vehicle should be viewed in the same way as any other personal effects found on the described premises. It is said, for example, that "it is no more necessary to describe a car on the premises than it would be to describe any other item of personal property in which the liquor might be stored." But the analogy is less than perfect. Certainly a vehicle, even one parked in a garage, has a lesser connection with the premises than "desks, cabinets, closets and similar items." and thus one might question whether a showing of probable cause as to certain premises should inevitably be deemed to cover a vehicle (even of the occupant) which happens to be parked on the property at the time the warrant is served. For example, if extensive surveillance has established that the householder is selling narcotics in his house to customers who appear there, but there has been no suggestion that he used his automobile in the illegal enterprise, it is not immediately apparent why a warrant to search the house must be deemed to cover the car in the same way as desks and closets in the house where the sales occurred.

W. LaFave, 2 *Search and Seizure* 322–323 (1987).

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[8] "Entezari cites no case, and we know of none, that stands for the proposition that police who are in possession of a valid search warrant, must have independent probable cause to search each area that is within the scope of the warrant.

"Entezari also contends that the trial court erred in concluding that because the Honda was a "container," it was appropriate to search it. He argues that a car is not a mere container and should be afforded as much privacy protection as a home. This argument seems simply to be another way of arguing that there must be independent probable cause to search the Honda. . ." Appendix A, at pages 8-9.

As noted above, if petitioner Entezari had chosen to park his car on the public street adjacent to his home, then his car would not have been "on the premises" of his residential property located at "8720 N.E. Benton Drive in Vancouver, Washington." Had he done this, there could not have been any contention that the locked car fell within the scope of the search warrant which authorized the search of the "DARK BLUE AND LIGHT SINGLE STORY RANCH STYLE, WOOD FRAME HOME WHICH HAS A COMPOSITION STYLE ROOF, BEARING [THAT] SPECIFIC ADDRESS . . ." Nor could the car have been searched without a warrant pursuant to the automobile exception, because there was no showing of probable cause to believe that it contained any evidence.

Petitioner submits that the Fourth Amendment should not be construed as providing him with *less* protection for the privacy of his car because he chose to park it in his own residential driveway rather than on a public street. In either case, probable cause to believe it contained evidence should be required before it can be searched, regardless of whether there has been a showing of probable cause sufficient to justify the search of his house.

D. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRIOR DECISION IN *FRANKS v. DELAWARE.*

The police affiant failed to advise the magistrate that the police had already searched petitioner's car earlier that day, looking for the murder weapon, and that the search had revealed no evidence of any kind. The act of the prior unsuccessful search was a "material fact" which bore heavily on the determination of whether there existed probable cause to believe that the car contained evidence. Had the police affiant included this material fact, clearly there could never have been any finding of probable cause to justify the search of the car. The Washington Court of Appeals erroneously concluded that there was no need to make an independent showing of probable cause for the search of the car so long as there was a showing of

probable cause sufficient to justify search of the house. Once this error is recognized, it is apparent that pursuant to the principles set forth in *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978), the police affiant's deliberate omission of a material fact taints any probable cause determination regarding the car, and requires suppression of the evidence found inside the car.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari to review the decision of Division Two of the Washington Court of Appeals should be granted.

DATED this 3rd day of September, 1993.

CARNEY BADLEY SMITH & SPELLMAN

By _____
JAMES E. LOBSENZ
Counsel of Record

Of Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MIKE ENTEZARI, Appellant.	NO. 13760-7-II Division Two Unpublished Opinion Filed January 25, 1993

ALEXANDER, J. — Mike Entezari appeals his conviction on a charge of murder in the first degree contending, primarily, that a gun seized from his car should not have been admitted into evidence because the search of the car, which was parked in the driveway of his home, was outside the scope of a warrant authorizing the search of Entezari's "home." Entezari also claims that the trial court erred in admitting evidence of statements he made at an earlier time to the effect that in his native country a woman loses any interest in property she had before marriage, in the event of divorce, and that a husband can kill his wife or have her executed with impunity. We affirm.

Mike and Effie Entezari were married in 1967. They had two children, a daughter, who is now a college student at Washington State University, and a son, a high school student. In February of 1988, Effie Entezari moved out of the family home and filed an action for dissolution of their marriage.

As part of the dissolution action, Effie and Mike Entezari were involved in a contested hearing to determine which of them was entitled to collect rent on one of their rental properties. The property, which was rented to Kenneth and Teresa Ward, was located across the street from the Entezaris' residence, then being occupied by Mike Entezari and his son. The trial judge hearing that matter entered a temporary order authorizing Effie Entezari to receive the rent money.

On August 12, 1988, Effie Entezari delivered the court's order to the Wards and explained to them that they should pay the rent to her instead of Mike Entezari. After Effie Entezari left the Wards' residence, Mike Entezari came across the street to find out why she had been there. Entezari told the Wards at that time that in Iran, his native country, "if a woman is married to a man and brings wealth with her to that marriage, and then leaves that marriage, . . . she is not entitled to take any of the money or the wealth that she brought to that marriage." He also told the Wards that in Iran, "the man can, if he so desires it, have her executed or can do it himself."

The Entezaris were unable to reach a property settlement and, as a consequence, their dissolution trial was set for May 9, 1989. They were scheduled to give depositions on May 2, 1989, but the day before the depositions were to be taken, Effie was shot in the head and killed. The shooting took place in a parking lot adjacent to the apartment building in which she lived. Several residents of the apartment complex heard what they variously described as a "back-fire," "firecracker," or "gunshot" that morning. One resident, Brenda Chapman, arrived at the apartment complex after working a "night shift" and found Effie Entezari's body lying on the ground near a car. Chapman called the police. When they arrived they found Effie Entezari's car keys, purse and wallet next to her body. The wallet still contained $250.

Detectives Spooner and Buckner of the Clark County Sheriff's Department contacted the Entezaris' son at his school to advise him of his mother's death. Before he was told that his mother had been

killed, he told Spooner that he had awakened at about 6 a.m. and discovered that his father and his father's Honda automobile were both gone from the residence. The son also told Spooner that it was very "odd" for his father to be gone at the time because he ordinarily did not leave the house before noon.

After the son was told that his mother had been killed, he advised Spooner that he believed his father was at Providence Hospital in Portland that afternoon for some tests. Spooner called Providence Hospital and confirmed that Mike Entezari was there. Spooner and Buckner then went to Portland and contacted Entezari at the hospital. They were later joined there by Detectives Trimble and Nelson.

Trimble advised Entezari of his *Miranda* rights. Entezari then consented to a search of his Honda automobile. Trimble made a cursory search of the interior of the car including the glove box and hatchback area. He found nothing of significance. Trimble then drove ahead of Entezari to the office of Entezari's attorney in Vancouver. Entezari was in his attorney's office for several hours. With the exception of about one hour, the police kept Entezari's car under surveillance during the time he was in the attorney's office. After Entezari left the attorney's office, Trimble confronted him and advised him that he was in the process of obtaining a warrant to search Entezari's house. Entezari then proceeded to his home in his Honda. Detectives Spooner and Buckner arrived at Entezari's residence at about the same time as Entezari did. Spooner escorted Entezari inside the home to await the search warrant.

Shortly thereafter, Detective Nelson telephoned a Clark County District Court judge in order to obtain a warrant. He read an affidavit to the judge which stated, in part, as follows:

> Based on the aforementioned facts, your affiant prays the court for the issuance of a Search Warrant for the aforedescribed residence, including outbuildings, curtilage thereto and the person of Mohamed Entezari.

Upon completion of the reading of the affidavit, the district court judge stated, "Okay. I find there is probable cause to go ahead and do the search." Nelson then read the text of the search warrant to the District Court judge, as follows:

> You are therefore commanded that with the necessary and proper assistance to make a diligent search, good cause having been shown therefore, of the following described property —, within 72 hours of the issuance of this warrant: a dark blue and light blue single story ranch style, wood frame home, which is, has a composition style roof, bearing the specific address of 8720 NE Benton Drive, Vancouver, Clark County, State of Washington.

Trimble and Nelson executed the warrant. Nelson seized the clothing Entezari was wearing. Trimble seized a box in the garage that contained a pistol box, a sales slip, a pair of pistol grips, and a brochure for a shooting range. Near these items, Trimble found and seized another box which contained a 50-cartridge box of .38 caliber ammunition. Six rounds were missing from that box.

Detective Spooner again searched the Honda automobile, which was parked in the driveway of the residence. Under a floor mat in the back seat, he found and seized an unloaded .38 caliber, 5-shot revolver. Next to the revolver Nelson found four live rounds of ammunition which matched the ammunition in the box. He also seized a fifth round, a "hollow point."

Mike Entezari was ultimately charged in Clark County Superior Court with first degree murder. Before trial, Entezari moved to suppress all of the evidence that had been seized by Nelson and Trimble on grounds that the affidavit (1) failed to establish probable cause, and (2) contained misrepresentations and omissions. He also moved to suppress the items seized from the Honda for the reasons that (1) the affidavit failed to establish probable cause to search the Honda, (2) the Honda was outside the scope of the search authorized by the warrant, and (3) the search was a repetitive, unconstitutional search. After a hearing, the motions to suppress were denied. The

evidence seized pursuant to the warrant was introduced at trial. A jury found Entezari guilty of first degree murder.

I. SEARCH OF THE HONDA

Entezari assigns error to the trial court's denial of his motion to suppress the evidence found in his Honda automobile. He makes several arguments in support of this assignment of error. We will discuss each.

A. Scope of Search Warrant

He contends, first, that the search of his honda was outside the scope of the search warrant and thus constitutes a warrantless search in violation of the Fourth Amendment to the United States Constitution and art. 1, § 7 of the Washington Constitution. In support of this contention, Entezari argues that the trial court erred in concluding that the term "home" in the search warrant includes the "curtilage," thus justifying a search of the automobile parked in the driveway of the home.

A vehicle parked on residential property can be searched under the authority of a warrant when the warrant authorizes a search of "premises." *State v. Claflin*, 38 Wn. App. 847, 853, 690 P.2d 1186, *review denied*, 103 Wn.2d 1014 (1984). Similarly, a search of a vehicle was held to be within the scope of a search warrant authorizing a search of the "premises of aforesaid, and all the buildings and outbuildings thereon, and all property real or personal situated on said described property." *State v. Huff*, 33 Wn.App. 304, 309, 654 P.2d 1211 (1982).

Here, the warrant did not authorize a search of "premises." Rather, it authorized a search of a specific "home," described as "a dark blue and light blue single story ranch style, wood frame home . . ." We must determine, therefore, if the warrant authorizing a search of that home authorized a search of property within the curtilage and, if so, whether the Honda was within the curtilage.

In *State v. Crandall,* 39 Wn. App. 849, P.2d 250 (1985), Division Three of this court held that a "home" encompasses the curtilage. It said:

> The curtilage, the land and outbuildings immediately surrounding and associated with the home, is considered "part of the home itself for fourth amendment purposes."

State v. Crandall, 39 Wn.App. 849, 852, 697 P.2d 250, *review denied,* 103 Wn.2d 1036 (1985) (quoting *Oliver v. United States,* 466 U.S. 170, 80 L. Ed. 2d 214, 104 S. Ct. 1735, 1742 (1984). Consistent with *Crandall,* this division has recently said:

> The curtilage is that area "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."

State v. Ridgeway, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990) quoting *United States v. Dunn,* 480 U.S. 294, 301, 94 L. Ed. 2d 326, 107 S. Ct. 1134 (1987). The view of this court is generally consistent with the view of one commentator, who said:

> Ordinarily, a description in a warrant of a dwelling at a certain place is taken to include the area within the curtilage of the dwelling, so that it would cover a vehicle parked in the driveway rather than the garage.

2 LaFave, § 4.10(c) at 324 (1987) (citations omitted).

We conclude that "curtilage," the area intimately tied to the home, is part of the home and, as such, falls within the ambit of a search warrant authorizing the search of a home. The fact that the home is specifically described by color, style and size, does not detract from that conclusion. Indeed, a specific description of the place to be searched is necessary to satisfy the constitutional requirement of particularity and serves primarily to minimize the risk that police will mistakenly search a place other than the place intended. Here, the specific description of the place to be searched, including a street address and physical description of the house, adequately apprised the police of the place to be searched.

Whether a specific area is within the curtilage is "determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family." *State v. Niedergang,* 43 Wn. App. 656, 660, 719 P.2d 576 (1986) (quoting, *Care v. United States,* 231 F.2d 22, 25 (10th Cir.), *cert. denied,* 351 U.S. 932, 100 L. Ed 1461, 76 S. Ct. 788 (1956); *see also State v. Ridgeway,* 57 Wn. App. 915, 918, 790 P.2d 1263 (1990). Even though a defendant has a reasonable expectation of privacy in areas within the curtilage, he or she may have expressly or impliedly consented to intrusions into those areas. Thus, our Supreme Court has stated, "[i]t is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house." *State v. Seagull,* 95 Wn.2d 898, 623 P.2d 44; *see also State v. Ridgeway,* 57 Wn. App. 915, 918, 790 P.2d 1263 (1990). Similarly, our Supreme Court has determined that a driveway may include areas that are impliedly open as well as areas that are expected to be private. *State v. Daugherty,* 94 W. 2d 263, 616 P.2d 649 (1980).

Here, the trial court's unchallenged findings establish that the Honda was parked in the driveway adjacent to Entezari's house, "approximately two feet from a garage" which was part of the same structure. It is clear from these findings that the driveway, where the Honda was parked, was in close proximity to the dwelling and was associated with the home. It is logical, therefore, to conclude that it was part of the curtilage. The trial court correctly concluded that the search of the Honda was within the scope of a search warrant authorizing a search of the home.

B. Independent Probable Cause To Search Honda

Entezari next contends that "even assuming, *arguendo,* that the warrant did authorize a search of a car parked in the driveway . . . there *still* must be a showing of probable cause to believe that the car contains evidence." He assigns error to the trial court's conclusion which provides in part:

> No independent probable cause is needed to justify search of the 1980 red Honda because it is within the scope of the original search warrant.... it is appropriate to search containers within the home. . . . The 1980 red Honda is nothing more than a container. It is the kind of container in which one may reasonably expect to find evidence. . . . it was appropriate to search the home, any vehicles and/or the person of defendant.

Entezari cites *State v. Cockrell,* 102 Wn.2d 561, 689 P.2d 32 (1984), for the proposition that evidence seized pursuant to a warrant should be suppressed absent a showing of independent probable cause for the search of a specific piece of property within the scope of the search warrant. In *Cockrell,* a residence was searched pursuant to a search warrant. The court in that case suppressed evidence seized from the residence because the affidavit for the search warrant failed to establish sufficient probable cause for a search of the residence. The court went on to conclude, however, that the lack of probable cause to search the residence did not invalidate the entire search because the search of other areas of the property was lawful. *State v. Cockrell,* 102 Wn.2d 561, 571, 689 P.2d 32 (1984); *see also State v. Halvorsen,* 21 Wn. App. 35, 37, 584 P.2d 408 (1978) (warrant authorized search of house and all persons present; held insufficient probable cause as to "all persons," thus, only that portion of the warrant was invalid).

Cockrell does not support Entezari's position. Entezari has not claimed that there was insufficient probable cause for the issuance of the search warrant. He argues, instead, that probable cause, independent of the warrant, is required for a search of the vehicle. Entezari cites no case, and we know of none, that stands for the proposition that police who are in possession of a valid search warrant, must have independent probable cause to search each area that is within the scope of the warrant.

C. Honda, A Container

Entezari also contends that the trial court erred in concluding that because the Honda was a "container," it was appropriate to search it. He argues that a car is not a mere container and should be

afforded as much privacy protection as a home. This argument seems simply to be another way of arguing that there must be independent probable cause to search the Honda. Although we agree that there is a legitimate expectation of privacy in one's vehicle under most circumstances, there is no requirement that a separate warrant be issued in order to search a vehicle that is located on premises that are subject to a search pursuant to a warrant. *State v. Claflin,* 38 Wn.App. 847, 853, 690 P.2d 1186, *review denied,* 103 Wn.2d 1014 (1984); *State v. Huff,* 33 Wn. App. 304, 309, 654 P.2d 1211 (1982).

D. Reasonable Place To Search For Weapon

Entezari assigns error to the following finding of fact:

> The 1980 red honda, in which the murder weapon was ultimately found, was the kind of place in which a weapon and other named evidence in the search warrant could reasonably be expected to be located by police.

This finding is supported by the evidence. Indeed, common sense suggests that a revolver could be hidden in an automobile. Entezari does not suggest otherwise. His argument is, rather, that the police could not "reasonably" believe that the weapon would be found in the automobile because they had searched it earlier in the day.

Whether evidence can reasonably be expected to be found in specific places requires a common sense approach. *See State v. Anderson,* 41 Wn. App. 85, 96, 702 P.2d 481 (1985), *reversed on other grounds,* 107 Wn.2d 745, 733 P.2d 517 (1987) (reasonable to expect that clothing might be contained in a garbage can-sized vacuum cleaner). Here, the warrant authorized police to seek a weapon and other named evidence. The unchallenged findings establish that the police knew Entezari was in possession of the Honda between the time of the initial consensual search of the Honda, and the later search pursuant to a warrant. Although Entezari was under police observation during most of the time

period between the two searches, there was a period of approximately one hour during which Entezari and his car were not under observation. Moreover, there was no evidence in the record that Entezari had been searched. Under a common sense approach, it was reasonable for the police to conclude that he had the opportunity to conceal a handgun and ammunition in the Honda.

E. Repetitive Search

Entezari asserts, additionally, that the evidence found in the Honda should be suppressed because it was found during the second search of the automobile. He argues that the second search was per se unreasonable. In support of his argument, Entezari cites *In Re McNear v. Rhay,* 65 Wn.2d 530, 540, 398 P.2d 732 (1965).

In *McNear,* the first search was lawful because it was based on consent. A second search, however, was held to be unreasonable because it was a warrantless search. The court stated:

> We conclude that the search and seizure conducted by the officers of the narcotic detail, without the benefit of a search warrant or further consent from petitioner, was unreasonable and in violation of his civil rights under the Fourth and Fifth Amendments to the United States Constitution.

In Re McNear v. Rhay, 65 Wn. 2d 530, 540, 398 P.2d 732 (1965).

Here, unlike *McNear,* the police did not conduct two searches of one place pursuant to one authorization. Rather, they searched once with consent and once with a valid warrant.

II. ALLEGED MISSTATEMENTS AND OMISSIONS BY OFFICER SEEKING WARRANT

Entezari contends that all the evidence seized pursuant to the search warrant should have been suppressed because the affiant, Detective Nelson, intentionally or recklessly omitted material facts from the affidavit. An omission of facts from an affidavit in support of a search warrant may invalidate the warrant if the omission is

(1) material, and (2) made knowingly, intentionally, or with reckless disregard for the truth. *State v. Garrison,* 118 Wn. 2d at 870, 873, 827 P.2d 1388 (1992) (citing *Franks v. Delaware,* 438 U.S. 154, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978). Material facts deliberately or recklessly omitted from an affidavit should be added to the information contained in the affidavit, and if the affidavit, as supplemented, fails to support probable cause, the warrant is void and the evidence must be excluded. *State v. Cord,* 103 Wn.2d 361, 693 P.2d 81 (1985).

Entezari contends that Detective Nelson failed to include the following material facts in the affidavit: (1) the police searched the Honda at 4 p.m. and found no evidence; (2) one of Effie Entezari's neighbors reported seeing a yellow car leave the apartment parking lot in a hurry at 6 a.m.; and (3) Entezari did not own a yellow car. He asserts that these facts tend to exculpate him, and that the omission of these facts demonstrated a pattern of intentional distortion.

"[I]t is not enough that the omitted facts 'tend' to negate probable cause. The challenged information [the omitted facts] must be *necessary* to the finding of probable cause." *Garrison,* 118 Wn.2d at 874 (emphasis in original). Moreover, a finding that an omitted fact is material is not enough in and of itself to lead to the inference that the omission was reckless. *Garrison,* 118 Wn.2d at 873.

Here, Nelson testified that when he prepared the affidavit he knew that a witness heard what she described as a "backfire" noise at about 6 a.m. on the day of the murder. The witness told him, also, that she had looked out the window to see a yellow colored car leaving the parking lot where Effie Entezari's body was found. Nelson testified that he did not include that information in the affidavit for several reasons: the witness was unable to identify the car or driver; she could not say whether the car was related to the murder; she was not sure she heard a gunshot; she had just been awakened when she saw the car; and the time frame was a little different than what other witnesses said about hearing a gun shot.

Nelson also testified that while he knew Mike Entezari owned three red cars, he did not know whether he also owned a yellow car, or whether the yellow car sighted on the morning of the murder was associated with Entezari.

Furthermore, Nelson testified that he omitted from the affidavit the fact that Detective Trimble had "partially searched" Entezari's Honda because, "I suppose it would have been a half-truth if it wasn't completed, I couldn't say there was no evidence in there because I didn't really know that." In light of these explanations, we believe that the record supports the trial court's finding that Detective Nelson was not reckless and did not intend to mislead the district court judge who issued the search warrant.

Even if we assumed that these omissions were made intentionally or recklessly, when these facts are added to the information in the affidavit, there remains probable cause for the warrant. The trial court did not err in refusing to suppress all of the evidence seized pursuant to the warrant.

III. TESTIMONY OF KEN AND TERESA WARD

Entezari contends that the trial court erred when it denied his motion in limine to exclude the testimony of Kenneth and Teresa Ward. He argues that the statements attributed to him by the Wards should have been excluded because the statements were too remote in time, overly prejudicial, and constitute evidence of "other acts." Kenneth Ward's testimony, in part, was as follows:

> And then he mentioned something to the effect of in their country, in their culture if a woman is married to a man and brings wealth and money with her to that marriage, and then leaves that marriage, then if the woman leaves the marriage, she is not entitled to take any of the money or wealth that she brought to that marriage. And he also said as [*sic*] that time that over there in their country, where they came from, that the man, if he so desires it, can have her executed or can do it himself. At which time my wife looked at him and said, well, this is

> America, you can't do that here. And at that point he looked disturbed and abruptly ended the conversation and left the house.

Teresa Ward's testimony was substantially similar to that of Kenneth Ward.

Generally, relevant evidence is admissible unless it is made inadmissible by a statute or rule. ER 402. Relevant evidence is evidence that is both probative and material. ER 401. "Probative" means that the evidence tends to make the existence of a fact more or less probable and "material" means that the fact must be of consequence. *State v. Saltarelli,* 98 Wn. 2d at 358, 362, 655 P.2d 697 (1982).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ..." ER 403. "The trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact." *State v. Rice,* 48 Wn.App. 7, 11, 737 P.2d 726 (1987). Admitting evidence lies within the sound discretion of the trial court and will not be reversed absent a manifest abuse of that discretion. *State v. Mak,* 105 Wn.2d 692, 702, 718 P.2d 407 (1985); *State v. Laureano,* 101 Wn.2d 745, 764, 682 P.2d 889 (1984).

Here, the evidence is probative and material because (1) the statement attributed to Entezari makes the existence of the fact that the divorce and resulting property settlement upset or angered Entezari more probable than that fact would be without the evidence, and (2) whether Entezari was upset or angered about the divorce and property settlement is a fact that is of consequence in determining whether he murdered his wife. Entezari argues that the statements were too far removed in time to be relevant. This argument has no merit in light of the fact that the divorce and property settlement negotiations were ongoing at the time the alleged statements were made and at the time Effie Entezari was murdered.

Entezari also argues that the evidence was unfairly prejudicial, and should have been excluded. " '[U]nfair prejudice' is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." *State v. Rice,* 48 Wn. App. 7, 13, 737 P.2d 726 (1987) citing K. Tegland, § 106 at 250. Unfair prejudice requires more than a showing that the evidence is harmful to the defendant's case.

> In almost every instance, a defendant can complain that admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged. Addition of the word "unfair" to "prejudice" obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the state and the defendant.

State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). Here, we are not persuaded that the trial court abused its discretion in balancing the probative value against the potential for unfair prejudice.

Entezari also asserts that the evidence should have been excluded under Evidence Rule 404(b). That rule provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Further, the evidence may be excluded if its probative value is substantially outweighed by unfair prejudice.

Entezari relies on *State v. Sargent,* 40 Wn. App. 340, 698 P.2d 598 (1985). There, the trial court allowed evidence to come in that the defendant had admitted hitting his wife 8 months before she was murdered. The trial court admitted the evidence to show "intent, attitude, and disposition." *Sargent,* 40 Wn. App. at 351. The reviewing court held that the trial court erred in finding the evidence

relevant, because there was "no relationship between proof of Sargent's intent the night of the murder and an argument with his wife 8 months earlier." *Sargent,* 40 Wn. App. at 352. Here, even assuming that these statements constitute "crimes, wrongs, or other acts," the evidence was admissible to show Entezari's intent and/or motive. We are not persuaded, therefore, that the trial court manifestly abused its discretion in weighing the probative value of the evidence against its potential for unfair prejudice.

The conviction is affirmed.[1]

s/ ALEXANDER, CJ

WE CONCUR:

s/ SENFELD, J.

s/ MORGAN, A.C.J.

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[1] A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MIKE ENTEZARI, Petitioner.	NO. 60270-1 C/A NO. 13760-7-II

This matter came before Department II of the Court on its June 9, 1993, Motion Calendar on Petition for Review. Department II having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 10th day of June, 1993.

S/ James A. Andersen
CHIEF JUSTICE